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Supreme Court of the United States

October Term, 1953

No. 28

EVELYN RICE,

Petitioner,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A Corporation; F. K. LYTLE, and J. M. GUNNELL

Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	Pages
Opinion Below	1
Jurisdiction	2
Question Presented	2
Constitution and Statutes Invoked	3
Statement of Case	3
Propositions Relied Upon by Respondent	4
Argument	4
Conclusion	9

TABLE OF CASES CITED

Brnilovich v. St. George Independent Serbian Orthodox Church (Pa. 1937), 191 A. 655, 110 A. L. R. 384 7

Barrows v. Jackson, (1953), 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 6

Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835 5

Dorsey v. Stuyvesant Town Corporation (1949), 209 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133, 339 U. S. 981, 70 S. Ct. 1019 Cert. Den., 94 L. Ed. 1385 5

Fujii v. Cal., 38 Cal. 2d 718, 242 Pac. 2d 617, 622 8

Hurd v. Hodge (1948), 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187 6

McGhee v. Sipes (1948), 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1187, 3 A. L. R. 2d 441 6

Rice v. Cemetery (Ia.), 60 N. W. 2d 110 1

Shelley v. Kraemer (1948), 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441 ..... 5, 6

CONSTITUTION, TREATY, TEXTS AND RULES CITED

Page

Iowa Rules of Civil Procedure No. 105 3

Anno.

110 A. L. R. 388 7

3 A. L. R. 2d 466 5

14 A. L. R. 2d 133 5

Fourteenth Amendment 3, 4, 5

United Nations Charter 3, 7, 8

Law of Cadavers and Burial and Burial Places, Jackson, Prentice-Hall, Inc., 1950 7

Rules of Supreme Court of the United States, Rule 38 4

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Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Iowa herein sought to be reviewed by Petitioner is entitled: "In the Supreme Court of Iowa, No. 102,48304, Evelyn Rice, Appellant, vs. Sioux City Memorial Park Cemetery, Incorporated, a corporation; F. K. Lytle and J. M. Gunnell, Appellees," filed September 22, 1953, rehearing denied November 20, 1953, printed in 60 N. W. 2d 110; all justices concurring.

JURISDICTION

Final judgment of the Supreme Court of Iowa, overruling petition for rehearing was entered on November 20, 1953. The petition for Writ of Certiorari in the Supreme Court of the United States was served on Respondents February 17, 1954. The jurisdiction of the Supreme Court of the United States is invoked under Title 28 U. S. C. § 1257 (3).

———o———

QUESTION PRESENTED

The question presented by Petitioner is:

Whether a private cemetery corporation, organized for profit, may refuse "right of sepulture" to a non-Caucasian in a case where plaintiff has voluntarily entered into a contract providing "Burial privileges accrue only to members of the Caucasian race."

Plaintiff below entered into a contract (R. 13-15) which provided in part:

> "* * * Party of the second part (plaintiff) agrees to purchase from the said party of the second part (defendant cemetery); * * * right of sepulture. * * * Burial privileges accrue only to members of the Caucasian race * * *."

Plaintiff requested defendant to bury her deceased husband, an American Indian, which request was refused. Plaintiff then brought suit against defendant for $180,000.00 damages for breach of contract and tort; claiming that the racial restriction was void. The court below ruled as a matter of law that the refusal of the court to grant plaintiff damages did not constitute "State

action," contrary to the *Fourteenth Amendment* to the United States Constitution, the *United Nations Charter*, or the public policy of the United States government.

—o—

CONSTITUTION AND STATUTES INVOKED

The applicable constitutional provisions and provisions of the United Nations Charter are referred to in petitioner's brief and are not repeated here.

—o—

STATEMENT OF CASE

Petitioner's brief adequately states the case here involved, except that petitioner has included several immaterial and prejudicial statements taken from the pleadings and which were in no way involved in the adjudication of law points by the lower court.

The lower court ruled on questions of law under the provisions of Rule 105, *Iowa Rules of Civil Procedure*, that the racial restrictive clause relative to right of sepulture was not "void" and could be relied upon by defendant as a defense in an action for damages. The Supreme Court of Iowa affirmed, holding that no "State action," violative of plaintiff's constitutional or other rights was involved (R. 63-77).

It is to be noted that plaintiff made no claim of fraud or mistake and did not seek reformation of the contract.

—o—

PROPOSITIONS RELIED UPON BY RESPONDENT

The Petition for Writ of Certiorari presents no question not heretofore determined by this Court, or decided by the Court below in a way probably not in accord with applicable decision of this Court. (Rule 38, 5 (a).)

(1) The Fourteenth Amendment forbids only state or official action and erects no bar against racial discrimination by private parties.

(2) Nothing in the United Nations Charter restricts racial restrictive covenants between private citizens of the United States.

(3) There is no "public policy" of the United States forbidding racial restrictive covenants "voluntarily entered into."

———o———

ARGUMENT

What is involved here is the novel theory advanced by Petitioner that a private party may enter into a contract containing a racial restriction and then recover damages from the other party to the contract because such other party refuses to agree to a violation of the contract.

Petitioner has conceded at all stages of this litigation and concedes in her brief in support of this Petition (Petitioner's brief, p. 20) that defendant cemetery had a perfect right to refuse to grant a right of sepulture to her, for racial reasons or for no reason at all. She admits that respondent was under no legal obligation to grant burial privileges to an Indian, and its refusal to do so would give her no right of action. She takes the position, however, that she may enter into a contract with the

cemetery by which she definitely agrees that the right of sepulture for which she contracts does not extend to the privilege of burying an Indian, and that she may then demand a judgment in a court of law for damages because the cemetery refused to bury an Indian contrary to her express agreement.

Petitioner recognizes that this Court has held many years ago in the *Civil Rights Cases,* 109 U. S. 3, 27 L. Ed. 835, that the Fourteenth Amendment to the United States Constitution refers only to "state action" and cannot be extended to acts of purely private parties. She recognizes further that this Court denied certiorari in the case of *Dorsey v. Stuyvesant Town Corporation* (1949), 209 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133, 339 U. S. 981, 70 S. Ct. 1019, Cert. Den. 94 L. Ed. 1385, wherein it was held that a private corporation (even though it had many of the attributes of public authority, emphasized in the dissenting opinion) might refuse with impunity to lease property, on purely racial grounds.

Petitioner cites and relies on *Shelley v. Kraemer* (1948), 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441, wherein this Court said:

> "That Amendment (Fourteenth) erects no shield against merely private conduct, however discriminatory or wrongful.
>
> "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there had been no action by the State and the provisions of the Amendment have not been violated."

The Petitioner by curious and perverted logic seizes upon the language, "voluntary adherence," and states:

> "If the petitioner had voluntarily acquiesced in the conduct of the cemetery, or if the petitioner and the cemetery voluntarily acquiesced in and complied with the terms of the restrictive covenant, no one would complain and that would not be violating a law or a treaty but here there was no voluntary acquiescence and, because one of the parties has refused to comply with the racially restrictive covenants on a voluntary basis, and the matter has been presented to court and the question is whether the Iowa court has violated the United Nations charter." (Petitioner's Brief, p. 12.)

Petitioner argues that since this Court has held in the *Shelley v. Kraemer* case, supra, and in *McGhee v. Sipes,* (1948), 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1187, 3 A. L. R. 2d 441; *Hurd v. Hodge* (1948), 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187, and in *Barrows v. Jackson,* (1953), 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586, that to *enforce* a racial restrictive covenant by the judicial arm of the State constitutes State action, that it is also State action for the State court to *do nothing* where a party to such a covenant attempts to repudiate it and recover damages from the other party.

Petitioner argues that since a restrictive covenant can not be used as a sword, it, therefore, cannot be used as a shield (Petitioner's Brief, p. 10). No decision of this Court has ever gone beyond saying that State action to *enforce* a restrictive covenant, either by injunction or damages, is forbidden by the Fourteenth Amendment. In the case at bar no State action is involved. Respondent is not defending a breach of covenant. Peti-

tioner, who desires to breach the contract, asks the State court to punish Respondent because it lived up to the terms of an agreement which Petitioner fairly and voluntarily made.

It should be pointed out that "right of sepulture" has a very ancient history and has always received special treatment in the law (See the *Law of Cadavers and Burial and Burial Places,* Percival E. Jackson Second Ed., Prentice-Hall, Inc., 1950. See also *Brnilovich v. St. George Independent Serbian Orthodox Church* (Pa. 1937), 191 A. 655, 110 A. L. R. 384, and Annotation "Right to Exclude from Privilege of Burial in Cemetery," 110 A. L. R. 388, 393).

The Respondent submits that Petitioner has not been punished by the decisions of the Iowa Supreme and District Courts because she married a non-Caucasian. Her marriage has nothing to do with this matter. She agreed in her contract not to bury a non-Caucasian. Had she attempted to have buried any non-relative who was not of the Caucasian race, she would equally have been met with the terms of her contract. Again, Respondent says that a marriage to a non-Caucasian had nothing to do with this case, and Respondent submits such an allusion as has been made is unfair and a reflection against the District Court and Supreme Court of Iowa, and is entirely unwarranted.

Is the decision of the Supreme Court of Iowa violative of the United Nations Charter? The question of the possible applicability of the *United Nations Charter* as a Treaty is very fully and adequately covered by decision of the Supreme Court of Iowa found at Division II of the decision (R. 71-73). The argument of Petitioner

as to this phase of the case is completely answered by the decision of the Michigan Supreme Court in *Sipes v. McGhee*, 316 Mich. 614, 25 N. W. 2d 638, 644, and of the Supreme Court of California in *Fujii v. Cal.*, 242 Pac. 2d 617, 622, 38 Cal. 2d 718, reviewing the decision in Cal. App. 217 Pac. 2d 481, and the Supreme Court of Iowa in the instant case. While *Sipes v. McGhee* was reversed by this Court on constitutional grounds, there was no criticism of the conclusions of the Michigan Court as to the applicability of the *United Nations Charter*. The language used by the United Nations Charter clearly indicates that the parts quoted by Petitioner were not self executing. "On those parts of the charter that were to be self executing, they were set forth in language that was clear and definite that such intention was manifest." (*Fujii v. Cal.*, supra.)

Likewise on the question of "public policy," this was also fully discussed by the Iowa Supreme Court (R. 70, 71-73). That Court said:

> "Our sympathy must not be allowed to carry us to the aid of either party in circumstances of this nature unless the restriction is clearly one against public policy. * * *
>
> "It is well to mention here that the proper state authority, the 1953 Iowa Legislature, in Chap. 84, Acts of the 55th G. A. Sec. 1, and Sec. 8, did expand the Iowa civil rights law to cover just such incidents as arose in this case, *but* it is also worthy of note that by exceptions this legislation did not abridge desirable individual rights of restriction in church and fraternal private burial places. Such proper discretion could not occur under plaintiff's urged expansion of constitutional construction. * * *

"* * * Having named such things lodging houses, restaurants and places of amusements, the defendants were not acting in violation of Iowa law and the expression 'expressio unius est exclusio alterius' is applicable here." (R. 70-71)

—o—

CONCLUSION

In conclusion it is submitted that the decision of the Supreme Court of Iowa, which is sought to be reviewed here, decides no question of substance not heretofore determined by this Court, nor has it decided any question not probably in accord with applicable decisions of this Court. It is conceded without question that Respondent cemetery would have violated no law or constitutional right of plaintiff by refusing to grant to her right of sepulture for any person not a member of the Caucasian race. It could refuse for any reason, a bad reason, or for no reason at all. The cemetery had consistently in the past restricted burial upon its property to members of the Caucasian race (R. 66). There is no evidence or claim that plaintiff, a white woman, at any time prior to the signing of the written contract revealed to the cemetery company that she had any intention of offering for burial the body of any person other than a Caucasian.

The contract in question between the parties was not a sale of land but an agreement to grant "right of sepulture" only to a member of the Caucasian race; the agreement between the parties provided for burial of a Caucasian and denial of burial to all others.

For a State court to have held that Petitioner had stated a cause of action against Respondent in damages

under the circumstances, would have been tantamount to holding that the parties had no right voluntarily to enter into the contract in question. No constitution, law or judicial decision supports such a holding.

Respectfully submitted,

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